Indiana Department of Education

Room 229, State House - Indianapolis, IN 46204-2798
Telephone: 317/232-6676

QUARTERLY REPORT

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The **Quarterly Report** provides information on recent judicial and administrative decisions affecting publicly funded education. Should anyone wish to have a copy of any decision noted herein, please call Kevin C. McDowell, General Counsel, at (317) 232-6676, or contact him by e-mail at <kmcdowel@doe.state.in.us>.

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ATHLETIC SCHEDULES AND GENDER EQUITY: DISPARITY ANALYSIS AND EQUAL ATHLETIC OPPORTUNITY

Although greater attention has been focused on disparities in opportunities for participation in interscholastic athletic competition by female athletes and on the relative disparities in the pay of their coaches and access to practice facilities,[1] courts have more recently been required to address the scheduling of athletic contests for girls' athletic teams and whether the scheduling results in certain inequities.

One of the earlier cases addressing this issue was State *ex rel.* Lambert v. West Virginia Board of Education, 447 S.E.2d 901 (W. Va. 1994). The girls' basketball team had only two weeks of organized practice prior to regular season play while the boys' teams had four weeks. The girls' basketball season was scheduled between September and November, a time generally considered off-season for this sport. The State Board of Education urged the West Virginia Secondary School Activities Commission to change the girls' basketball season so as to coincide with the boys' season, but the Commission refused. The court ordered the girls' basketball season to be moved to the traditional time for such a sport, finding that the refusal to do so denied equal protection and was unconstitutional gender-based discrimination under West Virginia's constitution.[2] The court provided both the State Board and the Commission an opportunity to justify the continuation of the current scheduling system, such as facility limitations, personnel or financial constraints, or similar obstacles. However, neither the State Board nor the Commission elected to do so, agreeing instead with the plaintiffs that the girls' basketball season should change and requesting the court to grant them a year to do so. 447 S.E.2d at 906.[3] The court explained the rationale for its determination.

> The scheduling of girls' high school athletics in a manner which is counter-conventional creates significant disadvantages for female athletes which are not shared by male athletes. These disadvantages include effective exclusion from interstate competition and tournaments, since surrounding states including Pennsylvania, Ohio, Kentucky, Maryland and Virginia schedule girls' basketball in the winter. Also, female basketball players are more often at a disadvantage with regard to college recruiter access. Further, female basketball players are afforded access to gyms for organized practices for only two weeks during hot summer months, as opposed to the four weeks of organized practice time afforded male

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[1]See "Gender Equity and Athletic Programs," **Quarterly Report** January-March: 1995.

[2]The Lambert case is better known for the requirement that a school district provide a signer for a deaf student so that she could participate on the basketball team. See "Athletic Competition, Students with Disabilities, and the 'Scholarship Rule,'**" Quarterly Report** April-June: 2004.

[3]The Commission argued the case was moot because the season had already been changed from fall to winter. The West Virginia Supreme Court of Appeals declined to do so because "without a court order, the Board may at any time change their policy, and revert the girls' basketball season back to the fall, or decide not to implement the new policy at all." 447 S.E.2d at 906, *n*. 14.

> basketball players during the late fall and winter months. Finally, because the girls currently do not play during the traditional season, they do not reap the benefits which normally come with the traditional season, including greater interest in basketball by the public, media and college recruiters. Perhaps more compelling than any unfairness to actual female basketball players is the message this scenario conveys to girls in general, that girls' sports are second-class, that boys take priority as to use of sports facilities and resources, and girls take the leavings. Hence, the message conveyed to young girls in this state is that they are not as important as the boys.

Id. at 907-08. "Since the scheduling of the girls' high school basketball season outside the time period traditionally observed as the official basketball season serves no important governmental objective, it is unconstitutional as it violates the equal protection clause" of West Virginia's constitution. Id. at 908.

The United States Courts of Appeal for both the Sixth and Second Circuits have recently weighed in on this issue.

In Michigan

Communities for Equity v. Michigan High School Athletic Association (MHSAA), 178 F.Supp.2d 805 (W.D. Mich. 2001) began as a class action suit in 1998 by parents and high school athletes under Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681, and the Equal Protection Clause of the Fourteenth Amendment.[4] The plaintiffs complained that certain girls' sports were scheduled during non-traditional and non-advantageous seasons, notably basketball, volleyball, soccer, and, in the Lower Peninsula, golf, swimming and diving, and tennis. Following an eight-day trial, the court found against the MHSAA, noting that the MHSAA only scheduled girls' athletic contests and not boys' contests at non-advantageous or non-traditional seasons, sending a "clear message that female athletes are subordinate to their male counterparts, and that girls' sports take a backseat to boys' sports in Michigan." 178 F.Supp. 2d at 837.

As an example, the court noted that girls' basketball began on August 13 and is completed by December 1. Not only is this not the traditional season for basketball (48 states schedule girls' basketball in the winter, the same as for the boys), but it prevents Michigan girls' teams from being included in national rankings (such as the high school rankings in *USA Today*) and prevents participation in high-profile basketball camps that are often held in the fall. It also prevents Michigan girls from being considered for All-American status. Michigan girls also do not participate in the "March Madness" basketball tournaments that are highly popular with the public. There are decreased opportunities for exposure to college recruiters. Four other states (North Dakota, South Dakota, Montana, and Virginia), the court

[4]"...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." There was also a State civil rights complaint that is not germane to this article.

observed, recently resolved this scheduling issue after being faced with litigation. The court also noted that this unusual season for girls' basketball was originally established in order to convenience the boys' basketball season, which the court found to be inequitable treatment not cured by the passing of time. Any advantages were outweighed by the disadvantages of conducting a high-profile sport during an off season. The court also noted that girls' volleyball was played in the winter whereas college women's volleyball (and 48 other States) played volleyball in the fall. Girls' soccer is scheduled for the spring rather than the fall when it is traditionally played. Spring in Michigan, the court observed, is disadvantageous for soccer players because the "[s]occer fields in Michigan are often still frozen or snow-covered," forcing the regular season to start later. The court also found that the other sports were scheduled in such a fashion as to be disadvantageous to female athletes. Id. at 817-836. The MHSAA did offer some reasons why certain sports were scheduled when they were, such as availability of golf courses, but the court noted that no balance between boys' and girls' sports as to certain disadvantages was attempted or achieved.[5] Id. at 851 (MHSAA could not justify "forcing girls to bear all of the disadvantageous playing seasons alone to solve the logistical problems").

The MHSAA appealed to the U.S. 6th Circuit Court of Appeals. The 6th Circuit affirmed the district court under the Equal Protection Clause and did not reach the Title IX claim. See Communities for Equity v. Michigan High School Athletic Association, Inc., 377 F.3d 504 (6th Cir. 2004).

The U.S. Supreme Court in United States v. Virginia, 518 U.S. 515, 116 S. Ct. 2264 (1996), in addressing the admission of women into the Virginia Military Institute (VMI), noted that "[p]arties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action." 518 U.S. at 531.

> The State must show at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives. The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.

Id. at 532-33 (internal punctuation and citations omitted). In this case, the MHSAA argued that its scheduling decisions "were designed to maximize girls' and boys' participation in athletics" through the creation of "optimal use of facilities, officials and coaches, thereby permitting more teams in a sport or more spots on a team." 377 F.3d at 512. The federal district court acknowledged the logistics of scheduling were important but that the MHSAA's reliance on "weak circumstantial" evidence was insufficient to override a finding of discrimination. Id.

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[5]By way of example, the Indiana High School Athletic Association (IHSAA) schedules girls' golf and boys' tennis in the fall, whereas it reverses this for the spring, with girls' tennis and boys' golf competing during this time. To the extent either sport (tennis or golf) is scheduled at a perceived disadvantageous time, both boys' and girls' teams would have equal experience in this regard. All other sports are scheduled during traditional seasons.

The MHSAA attempted to bolster its "weak circumstantial" evidence on appeal by showing that Michigan had a higher number of female participants in high school athletics than most states, thus satisfying the VMI requirement.

> The evidence offered by MHSAA, however, does not establish that separate seasons for boys and girls–let alone scheduling that results in the girls bearing all of the burden of playing during disadvantageous seasons–maximizes opportunities for participation. MHSAA argues that bare participation statistics "*are the link* showing that separate seasons are substantially related to maximum participation." (Emphasis added.) But a large gross participation number alone does not demonstrate that discriminatory scheduling of boys' and girls' athletic seasons is substantially related to the achievement of important government objectives.

377 F.3d at 513. The 6th Circuit did "not find that MHSAA's justification for its scheduling practices is 'exceedingly persuasive' in meeting the heightened standard required by *VMI* for the gender-based classification." Id. The federal district court's decision in favor of the plaintiffs was affirmed on the Equal Protection claim.

In New York

McCormick *et al.* v. The School District of Mamaroneck and the School District of Pelham, 370 F.3d 275 (2nd Cir. 2004) involved a challenge to the scheduling of girls' soccer in the spring–a non-traditional season for this sport–rather than the fall, when the boys' teams are scheduled.[6] The federal district court found that such scheduling deprives female athletes of post-season opportunities in violation of Title IX.[7] The school districts appealed, but the 2nd Circuit found that this practice denied female athletes equality of athletic opportunity without adequate justification, thus violating Title IX.

The plaintiffs were two female soccer players at two different New York public school districts. The school districts scheduled girls' soccer in the spring, a non-traditional season for the sport. Regional and State post-season games for both boys' and girls' teams, however, are played in the fall season. This created scheduling conflicts and deprived the female athletes at these schools of potential college scholarships. Of the 714 New York schools that had a girls' soccer team, only 65 scheduled girls' soccer in the spring. Id. at 279-80. Girls' soccer at these two school districts is the only sport scheduled outside of the State Championship tournament season.

In analyzing the Title IX claim, the 2nd Circuit provides an extensive history of the non-discrimination law. The court particularly noted with favor the implementing regulation at 34 C.F.R. § 106.41 and the

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[6]The IHSAA schedules girls' and boys' soccer in the fall, the traditional season for this sport at both the high school and collegiate levels.

[7]The plaintiffs originally included an Equal Protection claim under the 14th Amendment but later withdrew this claim.

factors the U.S. Department of Education's Office for Civil Rights (OCR) considers when assessing whether a recipient of federal education funds has provided "equal athletic opportunity for members of both sexes" in the recipient's interscholastic, club, or intramural athletic programs. The regulation at § 106.41(c) reads in relevant part:

> (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
> (2) The provision of equipment and supplies;
> (3) *Scheduling of games and practice time*;
> (4) Travel and per diem allowance;
> (5) Opportunity to receive coaching and academic tutoring;
> (6) Assignment and compensation of coaches and tutors;
> (7) Provision of locker rooms, practice and competitive facilities;
> (8) Provision of medical and training facilities and services;
> (9) Provision of housing and dining facilities and services[8];
> (10) Publicity.

370 F.3d at 288-89 (emphasis added by the court). OCR, when reviewing claims under "scheduling of games and practice time," examines "the equivalence for men and women of:
(1) The number of competitive events per sport;
(2) The number and length of practice opportunities;
(3) The time of day competitive events are scheduled;
(4) The time of day practice opportunities are scheduled; and
(5) *The opportunities to engage in available pre-season and post-season competition*."

Id. at 289.[9] The court deferred to OCR's Policy Interpretation in this matter, adding that it is "both persuasive and not unreasonable." Id. at 290. This would be so even though the Policy Interpretation addresses intercollegiate rather than interscholastic athletics. Id. The 2nd Circuit noted that "a disparity in one program component (i.e., scheduling of games and practice time) can alone constitute a Title IX violation if it is substantial enough in and of itself to deny equality of athletic opportunity to students of one sex at a school." Under OCR's Policy Interpretation, "a disparity is a difference, on the basis of sex, in benefits, treatment, services, or opportunities that has a negative impact on athletes of one sex when compared with benefits, treatment, services, or opportunities available to athletes of the other sex. A disparity does not mean that benefits, treatment, services, or opportunities are merely different." Id. at 291.[10] Under a disparity analysis, "identical scheduling for boys and girls is not required. Rather,

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[8]The regulations for Title IX also include intercollegiate athletic teams.

[9]The court quoted from a 1979 Policy Interpretation by OCR that can be found at http://www.ed.gov/about/offices/list/ocr/docs/t9interp.html. Current resources on this topic from OCR can also be located at http://www.ed.gov/about/offices/list/ocr/athleticresources.html.

[10]The court listed the following web site for OCR's "Title IX Athletics Investigator's Manual (1990)," an internal agency document that expands upon OCR's Policy Interpretation:

compliance is assessed by first determining whether a difference in scheduling has a negative impact on one sex, and then determining whether that disparity is substantial enough to deny members of that sex equality of athletic opportunity." Id. at 293.[11] OCR interpretation "contemplates that a disparity disadvantaging one sex in one part of a school's athletics program can be offset by a comparable advantage to that sex in another area." Id. Under this standard, the court wrote, "identical benefits, opportunities, or treatment are not required, provided the *overall effect* of any differences is negligible." Id. (emphasis original). This comparison should not be "sport-specific" but should include a "program-wide" examination of benefits and opportunities. Id.

> Schools thus have considerable flexibility in complying with Title IX. For example, a school that provides better equipment to the men's basketball team than to the women's basketball team would be in compliance with Title IX if it provided comparably better equipment to the women's soccer team than to the men's soccer team.

Id. at 293-94. In this case, it is without argument that scheduling of girls' soccer in the spring creates a disparity. This has a negative impact on girls. The affected school districts have not demonstrated that female athletes are receiving "comparably better treatment than male athletes at their schools. Thus, the disadvantage that girls face in the scheduling of soccer has not been offset by any advantages given to girls as compared to boys" in the two public school districts. In addition, "girls' soccer is the only sport at these schools scheduled in a season that precludes championship game play. Male athletes do not suffer from any comparable disadvantage." Id. at 294. The first prong of the test indicates a disparity exists.

The second prong is concerned with determining whether the disparity is substantial enough by itself to constitute a denial of equal athletic opportunity for female athletes at the two school districts. Id. The court rejected the schools' arguments that their girls' soccer teams were not competitive such that they would have made the post-season tournament even if it were available.

> First, a team that is bad one year can be a championship contender the next year. Second, even if any of the individual teams in this litigation are less likely than some others to make the State Championships, as counsel for [the two soccer players] stated at oral argument, "a girl's reach should exceed her grasp." The greater the potential victory, the greater the motivation to the athletes. Any championship motivates, but a great championship motivates more. The quality and achievements of a sport team are measured in reference to their relative success as compared to other teams. Winning the State Championship in New York means being the best team out of 649 teams in the state.... A primary purpose of competitive athletics is

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http://www.ncaa.org/gender_equity/resource_materials/AuditMaterial/Investigator's_Manual.pdf

[11]This is a two-prong analysis: First, the court must determine whether a disparity exists. If one does, then the court must determine whether this disparity is significant or substantial enough to constitute a denial of equal athletic opportunity.

> to strive to be the best. Being the best out of 19 (or 13) [which would be the situation for spring soccer participants] is simply not as good as being the best out of 649. The scheduling of soccer in the spring, therefore, places a ceiling on the possible achievement of the female soccer players that they cannot break through no matter how hard they strive. The boys are subject to no such ceiling. Treating girls differently regarding a matter so fundamental to the experience of sports–the chance to be champions–is inconsistent with Title IX's mandate of equal opportunity for both sexes. Scheduling the girls' soccer season out of the championship game season sends a message to the girls on the teams that they are not expected to succeed and that the school does not value their athletic abilities as much as it values the abilities of the boys.

Id. at 294-95. The court declined to consider the school districts' argument "that these girls are simply not interested in winning. Interest is often a function of experience and opportunity." Id. It would be contrary to Title IX "[t]o base our measurement of the significance of a denial of opportunity on the lesser value that may be placed on the success of girls in athletic competition..." Id. at 296.

The court also rebuffed the school districts' arguments that the plaintiffs were seeking "to place soccer above all other sports" and that such "single-mindedness is not protected by Title IX." Id. The schools' argument "misses the point." In the analysis under Title IX, a disparity in a single program component can be substantial enough to constitute a denial of equality of athletic opportunity. Equivalent athletic opportunities on a sport-specific basis may be analyzed. "Neither the applicable statute, the regulations, nor the Policy Interpretation suggest that the denial of equal athletic opportunity cannot result from a significant disparity in a single sport, and we decline to read any such suggestions into them." Id. The court concluded that the fact the boys have a chance to compete in the Regional and State Championships for soccer but the girls are denied this opportunity constitutes a disparity that is substantial enough to deny equality of athletic opportunity to the girls at the two public school districts. Id.

Although the court identified that a disparity existed, the school districts could still avoid a Title IX finding of non-compliance if they can identify non-discriminatory justifications for the disparity. The school districts' proffered reasons (not enough field space, have to hire another coach, possible shortage of officials) are insufficient as justifications for discrimination. "Hiring a new coach and finding more officials may cost money, but the fact that money needs to be spent to comply with Title IX is obviously not a defense to the statute." Id. at 297. The availability of field space is an administrative problem that can be resolved any number of ways, including moving the boys' soccer season to the spring. "There is no reason that the boys' soccer teams should be entitled to the fields, coaches, and officials in the fall simply because they were in the fall first." Id.

The court also rejected the schools' arguments that moving girls' soccer to the fall will force female athletes to choose which team they will compete for. This, the court observed, would be a short-term problem as female athletes entering the school systems will choose their sports and arrange their schedules accordingly. The court also rejected that girls' soccer in the fall could not compete with the "allure" of field hockey. The schools did not present "persuasive data" to support this contention. Id.

at 298. The court also rejected the schools' contentions that moving girls' soccer to the fall would leave female athletes with too few athletic offerings in the spring. This is again a matter of administrative convenience. The schools could elect to offer additional athletic teams during the spring. The schools did not demonstrate their inability to expand their athletic team offerings. Id. at 299.

BRICKS AND TILES: FUND-RAISING AND THE FIRST AMENDMENT

With funding streams not flowing as they once did, public entities are engaging in more creative means to enhance revenue.[12] One of the more popular means of doing so has been the selling of bricks or tiles for placement in public places with the purchaser able to impart some message for posterity on a brick or tile. Such fund-raising efforts inevitably become mired in free speech issues, especially where political, commercial, or religious speech is involved. This, in turn, requires a "forum analysis" in order to decide whether the area where the bricks or tiles will be displayed is a "public forum" opened to speech of all kinds; a "designated public forum" where expressive conduct is opened to all but in a non-traditional area; a "limited public forum" that is limited to specific types of expressive activity based on subject matter and identity of the speaker; and "nonpublic forum," which is neither traditionally open to the public nor designated for any particular expressive activity.[13] The only certainty is that the courts are uncertain how to address these disputes.

Several cases involving conflicts between public schools or public entities and parties asserting First Amendment rights have been reported previously.[14] Demmon v. Loudoun County Public Schools, 279 F.Supp.2d 689 (E.D. Va. 2003) involved a parent group that sold engraved paving bricks to parents or relatives of students as a fund-raising activity. The bricks would be used to create a "walkway of fame" on the school campus. There were no guidelines provided regarding acceptable messages but 24 symbols were allowed, most of these associated with extracurricular activities at the school. After the bricks were in place, the principal, due to perceived First Amendment Establishment Clause concerns,

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[12]See "Public Schools, Bricks and Tiles, and a Wall of Separation," **Quarterly Report** July-September: 2003.

[13]Courts traditionally divide the "forum analysis" into three categories: public, designated, and nonpublic. See Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 103 S. Ct. 948 (1983). However, in 1988, the U.S. Supreme Court established a school-sponsored forum akin to the limited public forum that allows for schools to restrict student speech if it bears the imprimatur of the school or is reasonably related to pedagogical concerns. Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 270-71, 108 S. Ct. 562 (1988). Courts have differed as to whether this "limited public forum" is a separate forum for analysis purposes, a sub-category of nonpublic forum, or a sub-category of "designated public forum."

[14]The First Amendment reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Constitution, Amendment I.

had removed those bricks that displayed a Latin Cross.[15] Plaintiffs claimed the removal of their bricks and disallowance of the Latin Cross altogether violated their rights under the Free Speech and Establishment Clauses of the U.S. Constitution. The court determined the "walkway of fame" was "limited public forum" opened by the school to families of students for personal messages designed to honor students, school personnel, and current or former school community members. The court further determined that the Latin Cross was impermissibly excluded solely on the basis of its religious message, thus constituting viewpoint discrimination. Speech that discusses otherwise permissible subjects cannot be excluded from a limited public forum merely because the viewpoint is one from a religious perspective. The purpose of the "walkway of fame" was not restricted to commemorating honorees for their involvement in school-sponsored activities. Absent such a narrow construction, exclusion of any religious symbol may have the impermissible effect of inhibiting religion. The court did not find compelling the school's argument that it was compelled to remove the bricks because of potential Establishment Clause violations.

In Anderson v. Mexico Academy and Central School, 186 F.Supp.2d 193 (N.D. N.Y. 2002), students and school officials sold bricks to the community as a fund-raising effort for the senior class trip. The bricks would be displayed on the school's campus. Purchasers of bricks could inscribe up to three lines of their choice. Obscene or vulgar messages were not permitted. Several bricks bore religious messages. Several people complained of the religious references. The school placed a disclaimer indicating the messages on the bricks were personal messages, but this did not satisfy the detractors. Eventually, the school removed the bricks that mentioned "Jesus" but left a brick that read, "God Bless You/Father Wirkes/St. Mary's Church." The school then adopted a policy forbidding all religious and political messages. Plaintiffs sought to have their bricks restored, alleging the school's actions violated the Free Speech and Establishment Clause**s.** The court did note its belief the school's actions amounted to viewpoint discrimination without determining whether the forum was "designated" or "limited." However, the court declined to enjoin the school's actions. The U.S. Court of Appeals for the Second Circuit remanded the matter to the district court, noting that a full, factual record needs to be developed because of the disagreement over the facts in this matter. Kiesinger *et al.* v. Mexico Academy and Central School *et al.*, 56 Fed. Appx. 549 (2nd Cir. 2003). The 2nd Circuit was careful to "caution that we intimate no view on the record to date or the merits of the claims herein." Id.

One of the more controversial decisions in this area has been Fleming v. Jefferson County School District R-1, 298 F.3d 918 (10th Cir. 2002), *cert. den.*, 537 U.S. 1110, 123 S. Ct. 893 (2003). Fleming arose from efforts to address community grief and consternation following the deadly attack by Eric Harris and Dylan Klebold on Columbine High School on April 20, 1999. The school proposed a project where students and community members would create tile art to be placed in the halls of the school. However, the school did not want this to become a memorial to the tragedy and, as a consequence, it placed limitations on the project, barring references to the attack, the names or initials of students, ribbons, obscene or offensive messages and symbols, and any religious references. Tiles were screened but some tiles slipped through the process. These tiles included, *inter alia*, crosses, gang graffiti, a Star

[15]The Latin Cross is a distinctly Christian symbol. It has a base stem longer than the three arms of the cross. See Harris v. City of Zion, 927 F.2d 1401 (7th Cir. 1991).

of David, a skull dripping with blood, angels, and the date of the attack. The school later relaxed its policy, permitting tiles with the names of children or their initials**,** the Columbine ribbon, and dates other than the date of the attack. Plaintiffs did not want to repaint their tiles but wished to submit the ones they had already painted. They sued, alleging violation of the Free Speech and Establishment Clauses. The federal district court found in favor of the plaintiffs on their Free Speech allegation, but the school appealed. The U.S. Court of Appeals for the Tenth Circuit reversed, relying upon the "limited public forum" language created by Hazelwood, noting that the tile project was "school-sponsored speech" and, therefore, merited a different analysis that did not require the school to be viewpoint neutral in determining whether limitations enacted by the school were constitutionally permissible. The school's restrictions were related to two "legitimate pedagogical interests": (1) Religious references may serve as a reminder of the shooting; and (2) Permitting the tiles would turn the walls into a situs for religious debate, which would be disruptive to the learning environment. 298 F.3d at 934. The Circuit Courts are divided on whether school-sponsored speech must be viewpoint neutral.

Two recent cases underscore the continuing difficulties courts have in analyzing and deciding these matters.

1. Tong v. The Chicago Park District, 316 F.Supp.2d 645 (N.D. Ill. 2004) began when the Chicago Park District (CPD) invited community members to purchase a brick that would be engraved with an inscription chosen by the donor and placed in a walkway in a neighborhood park (Senn Park). This fundraiser, known as "Buy-A-Brick," was actually initiated by an advisory council, but the CPD retained the right to review and approve proposed brick engravings and made the final decision regarding rejection or acceptance of a proposed brick. CPD had engaged in several similar fundraising events since the early 1990s. The Tongs submitted a proposed engraving that would have read, "Jesus in the cornerstone," which CPD rejected based on its religious content. The Tongs sued CPD. CPD argued the walkway was a nonpublic or limited public forum and that its policy of rejecting bricks with religious content was reasonable and viewpoint neutral. The problem, however, was that CPD actually had no coherent policy.

   CPD acknowledged it did not have a written policy specific to the "Buy-A-Brick" program, but it argued that it had other policies and procedures that were applicable. One such policy was entitled "Guidelines for Plaques, Markers and Donor Recognition in Parks" ("Donor Guidelines"). The Donor Guidelines have several suggested or permissive uses, but they only prohibit outright "logos, seals or other corporate identities..." There are no prohibitions against religious messages. 316 F.Supp.2d at 649. The Donor Guidelines cross reference with CPD's Guidelines for Acceptance of Public Art ("Public Art Guidelines"), which outline a two-phase review procedure. The Public Art Guidelines prohibit works that (1) depict or commemorate individuals who are still living or who have not been deceased for at least five years; (2) depict or commemorate an event until at least five years after the end of that event; (3) endorse or advocate religion or a specific religious belief; (4) depict obscenity or that malevolently portray, demean, or intimidate any racial or ethnic group; or (5) are of inferior or substandard workmanship. Id. CPD also has a separate policy for "Naming and Renaming of Parks and Park Features" ("Naming Guidelines") that, in relevant part, prohibits a park name or park feature from endorsing or advocating religion or a specific religious belief. Id.

CPD had no written policy that described how these various guidelines were to apply to the engraved bricks in the "Buy-A-Brick" fundraiser, nor was there a policy that outlined what procedures would be employed to review proposed brick engravings. The CPD's "unwritten policy" was to reject brick engravings that "contain (a) obscene material or connotations; (b) endorse or advocate religion or a specific religious belief; (c) endorse a specific political party or belief; or (d) malevolently portray, demean or intimidate any racial or ethnic group," or to prohibit engravings "of a political, religious or social nature." Id. at 649-50.

When the Senn Park fundraiser was initiated, CPD sent the organizers its Donor Guidelines but not its Naming or Public Art Guidelines. Circulars and postings on the internet invited community members to "Leave Your Mark on Senn Park" and "Choose Your Words." The promotion was successful. Some of the proposed engravings included "Peace on Earth," a statement of support from a State senator, "Plenty of grace be to his place" from a named family, a greetings from a condominium association, and "Your neighbor Immanuel Lutheran Church–With thanks to God for our neighbors." The Tongs' submission read as follows: "Missy, EB & Baby Tong–Jesus is the cornerstone. Love, Mom and Dad." Id. at 651. Only Tongs' and the Lutheran Church's submissions were rejected. The Lutheran Church revised its submission to read: "You neighbor Immanuel Lutheran Church–With thanks for our neighbors." The Tongs, however, were not willing to revise their proposed brick. CPD wrote to the Tongs, indicating that CPD could not install a brick with such a message because this would violate the Establishment Clause. The letter did not reference any specific CPD policy. When the bricks were installed, only the Tongs' brick submission was missing. Id. at 652.

The Tongs sued CPD, asserting violations of the Free Speech, Free Exercise, and Equal Protection Clauses. The federal district court found that CPD's refusal to accept the Tongs' brick based on its religious expression violated the Free Speech Clause of the First Amendment. Accordingly, the court did not address the Fee Exercise and Equal Protection claims. Id. at 652-53.

The court recognized that, as a threshold issue, the type of forum present will dictate to what extent private religious speech would be protected by the First Amendment. The court identified the three traditional forums (public, designated, and nonpublic), but added that the Supreme Court has added a fourth, the "limited public forum." A "public forum" exists where by long tradition or government decision the forum had been devoted to assembly and debate (*e.g.*, public parks and sidewalks). Government regulation of speech in such arenas is subject to strict scrutiny, and content based exclusions will be upheld only where they are necessary to serve a "compelling state interest" and the restrictions are "narrowly drawn to achieve that end." Id. at 653.

A "designated public forum" exists where the "government intentionally opens an otherwise nonpublic forum to public discourse." Government restrictions in this forum are also subject to strict scrutiny." Id. A "nonpublic forum" is an area where regulation of speech is permissible "as long as the content-based restrictions are reasonable and viewpoint neutral." Id. Lastly, the "limited public forum" exists where the government reserves access to its property "for certain

groups or for the discussion of certain topics." Any content-based restrictions in a "limited public forum" must be "viewpoint-neutral and reasonable in light of the purpose served by the forum." Id. at 653-54.

The relevant forum is the Senn Park walkway where the bricks were to be installed and not the park as a whole. Because the CPD engaged in viewpoint discrimination, the court found it unnecessary to decide whether the walkway was a nonpublic or limited public forum (as CPD argued) or a designated public forum (as the Tongs asserted). Id. at 654. The court rejected CPD's argument that its restrictions were not viewpoint neutral but were, rather, a permissible content-based restriction because it excluded all messages from bricks that advocated "a religious, political, or social idea, regardless of the point of view." The Tongs maintain their brick was excluded "because of its religious viewpoint on the otherwise includible subject matter of 'the mark that the donor wishes to leave.'"

The court agreed that if the "Tongs' proposed inscription fell within the included subject matter for which the Senn Park walkway was opened, the CPD cannot exclude the message because of its religious viewpoint on the subject matter." Id. at 654-55.

There was no question that a principal purpose of the Senn Park walkway "Buy-A-Brick" program was to raise funds for park refurbishment, and that CPD opened the walkway to community members for the limited purpose of providing "commemorative messages." However, CPD interpreted "commemorative messages" to include inscriptions that "express something important" to the family of the donor. Id. at 656. The record indicates CPD intended "to open the Senn Park walkway to commemorative messages" that "extended to statements of praise for other people and animals, statements of personal belief, and expressions of goodwill." Id. at 657. CPD's restriction on the Tongs' inscription prevented the Tongs from "making a statement from a religious perspective on a topic that other speakers [were] free to discuss." The Tongs' statement "was includible in the subject matter of the walkway but was excluded because of its religious perspective." Id.

The court was not entirely unsympathetic to CPD's concern that if it must accept the Tongs' brick, it would be forced to accept all religious messages, including some that may be deemed offensive to the community at large. "The CPD can protect itself in the future from their perceived problem...by creating a narrower definition of the 'includible subject matter' for its buy-a-brick programs. By limiting inscriptions to names of donors and their immediate family, for example, and by clearly communicating those limitations to potential donors, the CPD might avoid dilemmas such as the one presented here." Id.

There was little sympathy, however, for the CPD's argument that it needed to avoid the appearance of endorsing religious beliefs.

> Through buy-a-brick programs, the CPD opens park walkways to the public at large, the diverse inscriptions are all gathered together in a designated space, and many of the brick engravings identify the sponsor of the message

> on their face. Given these circumstances, there would have been no realistic danger that the community would think that the CPD was endorsing religion or any particular creed, and any benefit to religion would have been no more than incidental.

Id. at 657-58, relying upon Lamb's Chapel v. Central Moriches Union Free Sch. Dist., 508 U.S. 384, 395, 113 S. Ct. 2141 (1993) (internal punctuation omitted).

> At the heart of this matter lies the uncontested fact that the CPD invited the Tongs to submit an inscription that expressed something that was important to them as a family, as long as that sentiment was not a religious one.... In deciding to open up broadly the subject matter of buy-a-brick program engravings to commemorative messages that are important to a donor or the donor's family, the CPD put itself in a position to play editor to root out such expressions that include a religious viewpoint. This level of government interference with private speech is exactly the kind of activity that the First Amendment is designed to curtail.

Id. at 658. The court also found the CPD's review policy amounted to an unconstitutional prior restraint on speech because it conferred unfettered discretion on the CPD to decide whether to accept or reject a submission. In this case, CPD did not have any "narrowly drawn, reasonable and definite standards" to guide those reviewing the submissions, thus creating "unfettered discretion to determine whether to allow certain speech." The lack of specificity in any of its policies and procedures lead to "*post hoc* rationalizations" and "the use of shifting or illegitimate criteria," thus making it difficult for a court to determine whether the policies and procedures are permitting favorable or suppressing unfavorable expression. Id. at 658-59 (citations omitted).

The CPD admitted it had no written policy that establishes the procedures for reviewing proposed buy-a-brick engravings. Its three other Guidelines were never coordinated or apparently intended for this purpose. The court found that CPD "had no procedural policy" at all and could not explain "who decides whether proposed engravings will be reviewed and what criteria are used to make that determination." Id. at 660.

The court found "troublesome" the CPD's "conflicting and confusing explanations of how [its review] policy is carried out." The "record is replete," the court noted, "with examples of CPD's confusion," with various CPD personnel testifying at cross-purposes to each other. CPD also provided "conflicting explanations for how the Tongs' submission violated its substantive policy," which "further highlights the inherent ambiguity in that policy." Id. at 660-61.

> Ultimately, the CPD's legal arguments amount to an effort to cobble together the pieces of a scattered policy. But *post hoc* explanations of an unclear policy cannot revive a constitutionally defective policy. [Citation omitted.] Because the CPD policy is unwritten, and is applied in an incoherent and

> inconsistent manner, the CPD effectively grants unfettered discretion to whichever CPD staff member–if any–first comes into contact with a buy-a-brick application. The CPD has simply not governed its own decision making by "narrow, objective, and definite standards," [citation omitted], and its policy demonstrates a "lack of specificity in the procedure and the amount of discretion vested in the officials." [Citations omitted.] Thus, its policy is an unconstitutional prior restraint in violation of the First Amendment and the Tongs are entitled to declaratory and injunctive relief.

Id. at 661-62. CPD was ordered to install the Tongs' brick with their message intact.[16]

2. Seidman *et al.* v. Paradise Valley Unified School District No. 69, 327 F.Supp.2d 1098 (D. Ariz. 2004) started as a fund-raiser known as "Tiles for Smiles," where parents were encouraged to purchase personalized 4x8 saltillo tiles that would be permanently affixed to the interior wall of an elementary school. The fund-raiser was intended to purchase school equipment. The application form for the individual tiles indicated that parents could "immortalize [their] child or family" with a "special message of [their] choosing" subject to school's right to make "minor modifications." The tiles were also promoted as "great gifts for kids, parents, teachers, just about anyone. "Business/Company" tiles were also available. 327 F.Supp.2d at 1102.

   The Seidmans submitted applications and payment for two tiles, one each for their children. One tile would read "God Bless Quinn, We Love You Mom & Dad," while the other would read "God Bless Haley, We Love You Mom & Dad." The school rejected the applications because of Establishment Clause concerns. The school also rejected five (5) other applications with ostensible religious messages: (1) God Bless Our School; (2) God Bless America (two separate submissions); (3) God Bless Kate and Jack Fantetti 2002; and (4) Jesus Loves You, Site Consultants, Inc. The authors of these tiles revised their applications to remove all religious references, but the Seidmans refused to do so, submitting instead an application for one tile that would read: "In God We Trust, the Seidman Family." This tile was accepted and installed with the other accepted tiles. The Seidmans then sued, alleging violations of their federal and state constitutional rights. Id. Specifically, they argued the school's policies and procedures were unconstitutionally vague and that such policies and procedures violated their Free Speech and Free Exercise rights as well as the Establishment Clause. The school countered that its personnel were entitled to qualified immunity. Id. at 1103.

   The court initially had to determine what sort of forum for speech had been created: (1) public, (2) designated, (3) nonpublic, or (4) limited public, although the court addressed nonpublic

[16]Testimony by CPD personnel offered curious testimony, some of which the court referenced. At one point, one employee said he would have rejected a brick with "Jesus" on it because "Jesus" is a "corporate identity" for religion and corporate identities are prohibited. However, a brick inscribed "Senn Park Supporter–Einstein Bros. Bagels Andersonville" and several other similar bricks were permitted in the walkway and were not considered to have contained "corporate identities." Personnel also did not view bricks with the names of State legislators as being in any way political.

forum as included with "limited public forum," an approach not employed by other courts. "If...the forum is 'nonpublic,' such as a 'limited public forum,' the government is free to restrict access as long as the restrictions are reasonable and are not an effort to suppress expression merely because the government disagrees with the speakers' viewpoint." Id. at 1104. The relevant "forum" is the school's "Tiles for Smiles" program. Id. at 1105. The court noted that where a forum involves a public school's facilities, the public school would be a "public forum" only if school authorities had "by policy or by practice" opened the forum "for indiscriminate use" by the general public or some segment of the public. Id., citing Hazelwood, 484 U.S. at 267, 108 S. Ct. at 568 (1988). "If the facilities have been reserved for other intended purposes, communicative or otherwise, no public forum has been created." Id.

The "Tiles for Smiles" program was, without question, a school-authorized fund-raiser. The tiles were to be permanently affixed on the walls of the elementary school. However, the application forms were subject to some editorial oversight by the school, and the school exercised those rights to review and reject those applications that contained messages the school deemed to be controversial. "These factors do not suggest a 'clear intent' by the school district to open the forum to public discourse or for 'indiscriminate' use. In fact, these factors all suggest an intent by the school to maintain editorial control over the tile inscriptions." Id. There was no "unbridled expressive activity by the general public," thus militating against a finding this was a "designated public forum."

The court also had to analyze whether the "speech" involved was "private speech in a limited public forum" or "school-sponsored" speech. The latter is any speech that the public might reasonably perceive "to bear the imprimatur of the school." That is, the speech is "so closely connected to the school that it appears that the school is somehow sponsoring the speech." Id. at 1106. If the speech is "school sponsored," a school may exercise editorial control so long as its actions are reasonably related to legitimate pedagogical concerns, with "pedagogical" meaning the activity is "related to learning." Id. This can include consideration of the maturity of the intended audience, disassociation from speech inconsistent from the school's educational mission, and avoidance of the appearance of endorsing any views no matter the speaker. Id.

> The "Tiles for Smiles program was undisputedly a school-sponsored event, undertaken for a primarily educational purpose (fund-raising for school playground equipment). The audience and activity was undisputedly school-related. Thus, although not a part of the school's written "curriculum," the program was intended to serve a pedagogical interest. Also, as already discussed above, the evidence indicates that the school attempted to retain and exercise editorial control over tile messages in order to maintain control over the forum's content.

Id. at 1107. "School-sponsored" speech need not be solely related to curriculum but can apply to other programs sponsored by or through the school. "Clearly, the Tiles for Smiles Program was an expressive activity that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." Id. Accordingly, the speech involved in this program was "school-sponsored speech." Id.

Notwithstanding the above, the court rejected the school's argument that it excluded only a category of speech ("controversial subjects") rather than discriminate on the basis of viewpoint. The school relied on Fleming, *supra* (the Columbine High School tile project). The court found Tong, *supra* (the Senn Park walkway project) more convincing.

> Viewpoint discrimination that is directed at speech falling within a forum's limitations is impermissible. [Citation omitted.] The Court has found no authority allowing viewpoint discrimination when the speech merely bears the imprimatur of the school and the forum is located on school property. Accordingly, the Court rejects the Defendants' contention that application of a viewpoint neutrality analysis to topics that are otherwise permissible within the scope of a forum is inapplicable to school-sponsored speech that takes place on school property.

Id. at 1108. The court acknowledged the fact situation in this case is similar to Fleming, *supra*, but declined to follow the 10th Circuit's holding that school-sponsored speech does not require viewpoint neutrality. "This case does not involve a situation where the *school itself is speaking*, it involves a situation where the speech at issue, because of its location and nature, merely *bears the school's imprimatur*. Therefore, the Court must apply a viewpoint neutrality analysis." Id. at 1108-09. The court noted that such fund-raisers that are opened to the public for expression on various topics "place school officials squarely between the proverbial 'rock and a hard place,'" especially when grey areas involving religious expression arise. Id. at 1109. In this case, the school's policy excluded religion as a category of speech, but such a broad exclusion does not make the exclusion "viewpoint neutral" if the topic is secular but the only viewpoint prohibited is speech on the secular topic from a religious standpoint. "It is impermissible viewpoint-based discrimination to exclude speech on a topic that is 'otherwise permissible' within the scope of the forum merely because it is presented from a religious point of view." Id.

There was no dispute the underlying purpose of the "Tiles for Smiles" Program was to raise funds for the school. The school intended to limit the forum by allowing only messages that weren't controversial and that maintained neutrality. However, there was no specific policy describing what sort of messages were permissible in the forum. Although the school argued the inscriptions were intended to be limited to recognition of students, there were a number of tiles that contained messages expressing "ideas or expression," such as memorial statements, statements of personal belief, expressions of patriotism, recitations of poetry, and borderline business advertisements. Some of the sentiments expressed–and accepted for inclusion–were not "free from opposing viewpoints" and could be considered controversial to some in the community. "Thus, the Court can only conclude that, because of the lack of criteria defining the scope of the forum, the Defendants created a forum that was broader than it had originally intended." Id. at 1109-10. Messages of "love, praise, encouragement, or recognition" directed at children were certainly accepted inscriptions. The Seidmans' messages to their two children fit within the subject matter of the forum and the only reason their messages were rejected was because of the reference to "God."

> Viewpoint discrimination is a form of content discrimination where the government targets particular views taken by speakers on a given subject. [Citation omitted.] There is no viewpoint discrimination where a subject matter is categorically excluded from the forum regardless of the particular stand that the speaker takes on the topic. However, a policy broadly excluding religion as a category of speech is not viewpoint neutral if the policy permits the presentation of other views dealing with the same subject but excludes those presenting the issue from a religious standpoint. [Citation omitted.] A school district cannot exclude a message with underlying religious content when it allows messages on that same subject matter from a secular perspective.

Id. at 1111. "The Seidmans' messages were undisputedly excluded because of the perceived potential for controversy due to the use of the word 'God." ...Additionally, the Defendants admit that the reason that the 'In God We Trust' tile was accepted was because the word 'God' in that context, was not perceived by the school district as having any religious significance." Id.

> In this case, the school opened the forum to advertisements, general statements of belief and opinion, words recognizing or memorializing individuals and students. The school also opened the forum to "inspirational" or "encouraging" messages from parents to their children presented from political and secular perspectives but closed the forum to the same type of messages presented from a religious perspective. The Court can only conclude that the School District engaged in viewpoint discrimination by rejecting religious statements on a subject that would have been permissible as within the scope of the forum if presented from a secular point of view. [Court citations to Tong, *supra*, and Demmon, *supra*, with favor omitted.]

Id. at 1112. The court was not unsympathetic to the school's argument that avoidance of Establishment Clause violations was compelling justification for excluding religious messages. "There is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech. [Citation omitted.] Whether that interest is implicated in this case is another question." Id. The court then added a brief history of "God bless" as a commonly used phrase in American discourse, including "God Bless America" with its historic and patriotic significance; answering a sneeze with "God bless you"; and exclaiming "God bless!" as a form of mild expletive to express frustration. "God bless" is also used in religious contexts, but it refers to religion "in only the most general sense. The statements do not exhort any particular faith or identify any particular religion." The court was unpersuaded that acceptance of the Seidmans' original tiles would have created an Establishment Clause problem. Id.

> Although viewers reading the "Tiles for Smiles" display would likely have seen the display as a school-sponsored activity, even had the tiles at issue in this case been included in the display, a reasonable observer would not have

> interpreted the individual "God Bless" messages as conveying the idea that any one particular faith, church, creed, or "God" was favored or preferred over another, including a "religion of non-religion."

Id. at 1113. The display of the tiles presented no "coercive pressure on the students to participate in religious observance" nor was there any "government sponsorship of religion." No bricks contained any attempts at proselytizing or exhortation of religious observance. The excluded tiles would have been scattered among a display of over 360 other tiles, which makes the excluded tiles "seem particularly benign in light of the fact that they were directed at particular individuals..." The display wasn't designed so as to draw attention to any particular inscription. Also, nearly all the tiles were signed by the author of the message or it was clear to whom the sentiment was directed. "Although signatures are not the equivalent of an express disclaimer by the school, there is certainly less danger of a perception of endorsement than if it was not readily apparent that the school did not write the individual messages." Id. at 1113-14.

> The Defendants have failed to present any precedent that suggests that permitting non-proselytizing text from a general religious perspective on a topic that has already been allowed within the scope of the forum would result in an Establishment Clause violation. The Court finds that the Defendants' interest in avoiding an Establishment Clause violation was not compelling enough to justify exclusion of the Seidmans' messages because of their religious viewpoint.

Id. at 1114.[17] The Seidmans were entitled to summary judgment on their Free Speech claims. The court did find the school did not violate the Establishment Clause by creating a "religion of secularism" through the "Tiles for Smiles" program. Id. at 1119. The school also did not violate the Seidmans' Free Exercise rights. Id. at 1118. Finally, the court noted that this case is a murky one and that school officials could not be expected to be held to a higher level of "knowledge and understanding of the legal landscape than the knowledge and understanding displayed by judges whose everyday business it is to decipher the meaning of judicial opinion." Id. at 1120-21 [citation omitted]. Accordingly, the court found the individual school officials were entitled to qualified immunity. Id. at 1121.

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[17]The court worried that the door may be open to other inscriptions that begin to fall outside the "benign" nature of "God bless," such as requesting a blessing from Allah (an identifiable religion) or an inscription that reads "God blesses none, for there is no god" (the religion of non-religion). "Clearly, the hallways of our public elementary schools are not an appropriate place for such discourse and debate. Nevertheless, the school cannot exclude religious viewpoints on topics that they have already permitted into the forum. Perhaps, in this case, the proverbial 'rock and a hard place' was created not because of the 'grey' nature of the speech at issue but by the school district's failure to define the scope of the forum with any real degree of specificity." 327 F.Supp.2d at 1114. The court also noted the school's inconsistent policy would permit "In God We Trust," the Nation's Motto, but exclude "God Bless America," a song with patriotic meaning akin to the National Anthem. "This leads the Court to question: would the school have rejected a statement that 'God Enriches'? Would the school's opinion change if it knew that this statement is the official motto of the State of Arizona?" Id. at 1117.

COURT JESTERS: SPELL CHECKMATE

The 77th Annual Scripps National Spelling Bee is over. David Tidmarsh, a 14-year-old eighth-grade student from South Bend, Indiana, spelled "autochthonous" (meaning "indigenous" or "native") to win the nationally televised contest. For his efforts, he received $17,000, an engraved cup, encyclopedias, a visit with the President at the White House, appearances on television shows, and articles in national magazines.

Tidmarsh, who tied for 16th place the year before, defeated 264 other students in the contest conducted annually in Washington, D.C. There has been growing interest in the National Spelling Bee such that the contest was televised nationally and was the subject of a popular 2002 documentary, "Spellbound," released in movie theaters. "Spellbound" follows the exploits of eight teenagers as they prepared to compete in the 1999 National Spelling Bee.

Of course, any prominent institution such as the National Spelling Bee will draw protesters and conspiracy allegations.

Members of the American Literacy Society picketed the 77th Annual spelling bee, complaining, *inter alia*, English spelling is illogical and the National Spelling Bee reinforces illogical spelling. Standard (but illogical) English spelling contributes to dyslexia, high illiteracy rates, and hardships for immigrants. They advocate a simplified spelling system. Protesters carried signs reading "I'm thru with through," "Spelling shudd be logical,' and "Spell different difrent."[18]

Conspiracy buffs were active on the internet, insinuating Tidmarsh was given an unfair advantage because "autochthonous" was the "Word of the Day" on Dictionary.com the day before. Hmmmmm.

Protesters and conspiracy theorists are mainstays on the national stage, but nothing is more American than suing someone. The National Spelling Bee is no different.

In McDonald v. Scripps Newspaper *et al.*, 210 Cal. App. 3d 100, 257 Cal. Rptr. 473 (Cal. App. 1989), Gavin L. McDonald lost the 1987 Ventura County Spelling Bee, one of the qualifying rounds leading to the National Spelling Bee in the Nation's Capital. The declared winner originally lost at the school district level when he spelled "horsy" as "h-o-r-s-e-y." Later, it was discovered that "horsey" is an acceptable alternative spelling. By then, another student had been already been declared the school district's champion with the right to participate in the county spelling bee. The judges–obviously not from any Olympic judging venue–decided to declare two winners and let both students participate in the county spelling bee.

[18]"Spelling-Bee Protesters 'Thru with Through,'" *The Seattle Times* (June 3, 2004).

As luck would have it, the student who beat McDonald was the student originally eliminated because of his spelling of "horsy" (or "horsey"). McDonald felt that contest officials improperly allowed the student to compete because, had officials not violated contest rules, the winner "would not have had the opportunity" to defeat McDonald. He sued the local sponsoring newspaper and the Scripps-Howard National Spelling Bee, alleging breach of contract, breach of implied covenant of good faith and fair dealing, and intentional and negligent infliction of emotional distress. He sought compensatory and punitive damages. The trial court, however, spelled relief for the defendants, dismissing the action with prejudice.

McDonald appealed. It was apparent from the outset where the California Court of Appeals stood on the matter.

> Question–When should an attorney say "no" to a client?
> Answer–When asked to file a lawsuit like this one.

257 Cal. Rptr. at 474. Just in case there might be some lingering doubt, the court added: "We affirm because two things are missing here–causation and common sense." Id. Notwithstanding the lack of merit, the appellate court was required to address McDonald's assertions of errors by the trial court.

> In our puzzlement as to how this case ever found its way into court, we are reminded of the words of a romantic poet.
>
> "The [law] is too much with us; late and soon,
> Getting and spending, we lay waste our powers:
> Little we see in Nature that is ours;
> We have given our hearts away, a sordid boon!"
>
> (Wordsworth, *The World Is Too Much With Us* (1807) with apologies to Williams Wordsworth, who we feel, if he were here, would approve.)

Id. McDonald should have been satisfied with his performance. "Being adjudged the second-best orthographer in Ventura County is an impressive accomplishment, but pique overcame self-esteem. The spelling contest became a legal contest." Id. As noted *supra*, the trial court found that Gavin's complaint failed to state a cause of action.

> The erudite trial judge stated Gavin's shortcoming incisively. "I see a gigantic causation problem...." Relying upon the most important resource a judge has, he said, "common sense tells me that this lawsuit is nonsense."

Id. at 475. The appellate court found no merit to any of Gavin's legal theories, especially his third cause of action.

> The third cause of action states that plaintiff has suffered humiliation, indignity, mortification, worry, grief, anxiety, fright, mental anguish, and emotional distress, not to mention loss of respect and standing the community. These terms more appropriately express how attorneys who draft complaints like this should feel.

Id. at 476. Dismissal of this trivial action was warranted. "Our decision at least keeps plaintiff's bucket of water from being added to the tidal wave of litigation that has engulfed our courts." Id.

The Court of Appeals, to its credit, never blamed Gavin for this lawsuit. See Id. at 474, *n.* 1. It was clear that adults were the instigators. Nevertheless, the court felt compelled to speak directly to the young scholar.

Advice to Gavin and an Aphorism or Two

> Gavin has much to be proud of. He participated in a spelling bee that challenged the powers of memory and concentration. He met the challenge well but lost out to another contestant. Gavin took first in his school and can be justifiably proud of his performance.
>
> It is this lawsuit that is trivial, not his achievement. Our courts try to give redress for real harms; they cannot offer palliatives for imagined injuries.
>
> Vince Lombardi may have had a point,[19] but so did Grantland Rice–It is "not that you won or lost–but how you played the game."
>
> As for the judgment of the trial court, we'll spell it out. A-F-F-I-R-M-E-D.

Id. at 477.

QUOTABLE . . .

> A judge whose prescience is exceeded only by his eloquence said that "...Courts of Justice do not pretend to furnish cures for all the miseries of human life. They redress or punish gross violations of duty, but they go no farther; they cannot make men virtuous: and, as the happiness of the world depends upon its virtue, there may

[19]"Winning isn't everything; it is the only thing." The court quoted Lombardi earlier in this decision. Id. at 475.

be much unhappiness in it which human laws cannot undertake to remove." (*Evans v. Evans* (1790) Consistory Court of London.)

California Court of Appeals' Judge Arthur Gilbert in McDonald v. Scripps Newspapers *et al.*, 210 Cal. App. 3d. 100, 105, 257 Cal. Rptr. 473, 476 (Cal. App. 1989), preparing to affirm the trial court's dismissal of a lawsuit by an unsuccessful contestant in a qualifying round for the National Spelling Bee.

UPDATES

Sexual Orientation and the Equal Access Act

The Equal Access Act, 20 U.S.C. § 4071 *et seq.* and the U.S. Supreme Court's decision in Board of Education of Westside Community Schools v. Mergens, 496 U.S. 227, 110 S. Ct. 2356 (1990) have become embroiled in recent years in attempts to form non-curriculum clubs at the high school level that are concerned with sexual orientation.[20] The most recent published case takes a different spin from the others.

In Caudillo v. Lubbock Independent School District, 311 F.Supp.2d 550 (N.D. Tex. 2004), there was no question the local school board had adopted a "limited open forum" and that the Equal Access Act (EAA) applied. The school district also has a policy that it will "not prohibit student expression solely because other students, teachers, administrators, or parents may disagree with its content." However, the school board had also adopted an abstinence policy that applied to all matters concerning or involving sexual activity. Faculty and students sought permission to post notices and give PA announcements at the high school regarding off-campus meetings of the Gay and Proud Youth Group (GAP Youth, later known as the Lubbock Gay Straight Alliance or LGSA). Later, the LGSA sought to be recognized as a non-curriculum group and be permitted to have meetings on campus. All requests were denied.

One the principal reasons LGSA's requests were denied was related to the group's web site, which contained links to other web sites where there was sexually explicit content deemed unsuitable for high school students. 311 F.Supp.2d at 556-57. At the time of the LSGA's requests, Texas law banned sexual acts between homosexuals as well as sexual acts between minors if they are of the same gender, or if they are of opposite sex but more than three years apart in age. Id. at 558. LGSA sued under the EAA and the First Amendment.

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[20]See "Sexual Orientation, The Equal Access Act, and the Equal Protection Clause," **Quarterly Report** July-September: 2002 and "Updates" in **Quarterly Report** January-March: 2003.

The court noted that this was a case of first impression, not so much because it involved a non-curriculum club concerned with issues affecting homosexual youth but because of the school's abstinence-only policy that bans any discussion of sexual activity on the school's campuses. Id. at 559.

First Amendment and "Limited Public Forum"

Under the First Amendment analysis, the court noted the school district had created a "limited public forum," but this does not mean that a school must allow persons to engage in every type of speech. "Limited public forums allow a school to limit the subject-matter topics that will be discussed, but not the individual viewpoints on the allowed subject matter." Id at 560, citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-49, 103 S. Ct. 948 (1983). Although the school may limit the subject-matter topics, it "may not limit viewpoints on particular subjects that it has allowed in a limited public forum." Even the subject-matter restriction must be reasonable in light of the purpose served by the forum. In this case, the school's forum is reserved for student groups. Only students were permitted to post fliers and hold group meetings. The LGSA asserted the school's actions impermissibly excluded viewpoints germane to the permissible subject matter of the forum. Id. The court disagreed.

> Here, the entire subject matter of sexual activity was banned. Restrictions to the subject matter are allowed if reasonable in light of the purpose served by the forum and as long as the restrictions are not an effort to suppress expression merely because officials oppose the speaker's view. [Citation and internal punctuation omitted.] Affidavits and deposition testimony indicate that Defendants would have clearly denied *any* group access to school facilities if such a group had chosen to violate the school's policy regarding discussion of sexual activity and the group was, at its core, based upon sexual activity. The distinction of whether the material is homosexual or heterosexual in nature is irrelevant.

Id. at 561 (emphasis original). The school district "has a policy that excludes discussion of sexual content of both heterosexual and homosexual views. No evidence exists that would allow this Court to conclude that one viewpoint was allowed while the other viewpoint was denied." Id. at 562. The material on LGSA's website, as well as its stated goal to discuss sexual activity, "fall within the purview of speech of an indecent nature, such that [the school district] may regulate and prohibit such speech from its campuses." Id. at 563. The school's "abstinence-only policy is clearly reasonable, especially when viewed in light of the age group affected [.]" Id. This restriction is "narrowly drawn in light of the compelling interest." Id. "The forum was reserved for students and student groups. Subject matter of a sexual content in a limited public forum is clearly excludable if reasonable." Id. at 564. "Listing as a goal the discussion of safe sex and advertising a website address with links to obscene and explicit sexual conduct go beyond the bounds of First Amendment protection in the public school setting." Id.

Equal Access Act and "Limited Open Forum"

The school district admits that, under the EAA, it has created a "limited open forum."[21] However, it maintains that the EAA and Supreme Court constructions permit it to prohibit meetings that would "materially and substantially interfere with the orderly conduct of educational activities within the school." Mergens, 496 U.S. at 241, 110 S. Ct. 2356. The EAA itself does not "limit the authority of the school...to maintain order and discipline on school premises [and] to protect the well-being of students and faculty..." 20 U.S.C. § 4071(f). Id. at 565. The school acknowledged that at the time these events transpired, Texas law criminalized homosexual activity.[22] It took this into account when it denied LGAS's repeated access requests because the topics of discussion "advocated the violation of state law."[23] Id. Permitting discussions of topics that contravene state law "would be in contradiction of maintaining order and discipline as well as contradicting the students' well being." Id. at 566. Permitting the LGSA to meet and discuss topics that contravene state law "would substantially and materially interfere with the orderly conduct of the school's educational activities within the school." Id. Specifically, permitting the LGSA to meet and discuss its intended topics on sexual activity "would cause material interference with [the school's] abstinence-only policy." Id.

The LGSA argued that the Texas law addressed only conduct and not speech. It asserted that speech on sexual activity, including homosexual activity, was not banned by any state law. Id. at 567. They also argued that any disruption to the educational process would be occasioned by a few people exercising a "heckler's veto." Id. at 568.

The court agreed with the school district that there existed the likelihood for sexual-orientation harassment should the LGSA be permitted on campus and "that could lead to disruptive and dangerous conditions for the students," even though the threats received to date were by telephone and anonymous. The court determined the school "is clearly within its rights in invoking the maintaining-order-and-discipline exception to the EAA." Id. at 569-70.

The court actually found the school district's "well being" argument "most compelling." Under 20 U.S.C. § 4071(f), as noted *supra*, the EAA does not limit the authority of school districts "to protect the well-being of students and faculty." The school district "has a compelling interest in protecting the students' mental and physical health and well-being." Id. at 570. The stated goals of the LGSA

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[21]This language appears at 20 U.S.C. § 4071(a) of the EAA: "It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of religious, political, philosophical, or other content of the speech at such meetings."

[22]The Texas law was declared unconstitutional by the U.S. Supreme Court in Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472 (2003).

[23]"Nothing in this subchapter shall be construed to authorize the United States or any State or political subdivision thereof to sanction meetings that are otherwise unlawful." 20 U.S.C. § 4071(d)(5).

and the content available on and through the LGSA's website "directly endanger the well-being of the students in multiple respects." Id.

> The Court finds that the compelling interest includes protecting students from teen pregnancy, sexually transmitted diseases, the harms associated with sexual activity and minors, and the harms associated with exposing minors to sexual subject matters.

Id. at 571. The court further found the school district "properly considered the effects of exposing minors to sexual subject matter and materials and how that could be detrimental to the students' physical, mental, and emotional well-being. The Court finds that students should not be exposed to the type of material that was available on the group's website." Id.

> In summation, this case has nothing to do with a denial of rights to students because of their sexual viewpoints. It is instead an assertion of a school's right not to surrender control of the public school system to students and erode a community's standard of what subject matter is considered obscene and inappropriate. At some point, a line must be drawn that considers the proper subject matter allowed in the schools of this country. The effects of exposing minors to sexual material before they are mature enough to understand its consequences and far-reaching psychological ramifications compels a school district to step in and draw such a line.

Id. at 572.

The Out-Of-State Attorney

The Individuals with Disabilities Education Act (IDEA) at 20 U.S.C. § 1415(i)(3), 34 C.F.R. § 300.513 provides that parents who prevail in administrative or judicial proceedings conducted pursuant to the IDEA can recover their attorney fees as a part of their costs.[24] IDEA, however, does not define "attorney." Congress, in enacting the IDEA, did not limit any State's traditional control over the regulation of the practice of law. See, for example, Arons v. New Jersey State Board of Education, 842 F.2d 59, 63 (3rd Cir. 1988).[25] The question is whether an attorney licensed to practice law in one State can represent parents in an IDEA action in another State with the parents still able to recover "attorney" fees as a part of their costs should they ultimately prevail.

The first case to address the issue definitively was Z.A. v. San Bruno Park School District, 165 F.3d 1273 (9th Cir. 1999), which involved a California administrative hearing where the parents were represented by an attorney not licensed to practice law in California. California, like Indiana, forbids any person from recovering compensation for legal services as an attorney unless that person is a member of the State bar at the time the services were rendered.Because the attorney was not licensed to practice law in California, the parents were not entitled to recover for "attorney" fees. Being

[24]For corresponding Indiana provisions, see 511 IAC 7-30-4(p), 511 IAC 7-30-6.

[25]See also "Attorney Fees and the IDEA," Recent Decisions 1-12: 1999.

admitted to practice in one of the federal district courts in California does alter this requirement because one does not have to be a member of a State bar in order to be admitted to practice law in any federal district court. The out-of-state attorney "could only appear at the hearing in a non-lawyer advisor capacity" as allowed by IDEA. 165 F.3d at 1276. "A person is or is not licensed to practice law in a particular forum. There is no half-way. If not licensed, one cannot practice in that forum and cannot charge, or receive attorney's fees for such services under penalty of criminal law." Id.

Shortly after Z.A., an Indiana court had the opportunity to address the same issue. In Nathan C. v. School City of Hobart, 30 IDELR 396 (N.D. Ind. 1999), an attorney licensed to practice in Illinois and Missouri represented two separate families in two separate IDEA hearings in Indiana. The disputes were eventually resolved with the parents substantially prevailing. Nevertheless, the school declined to pay any attorney fees because the lawyer was not licensed to practice law in Indiana and had not obtained permission *pro hac vice* to represent either family.[26] The school argued that if the attorney had been engaged in the practice of law in Indiana without a license to do so, such activity would amount to the unauthorized practice of law, a criminal activity.[27] The court agreed, finding that an attorney not admitted to practice law in Indiana may not recover for services rendered in Indiana**.** An attorney not licensed in Indiana could represent a parent in such proceedings, but the attorney's role would be as a representative or an advocate, which are not reimbursable as costs under IDEA. Federal law has not pre-empted the role of States in determining who may practice law. The Indiana court was heavily influenced by the decision in Z.A..

The 9th Circuit has had the occasion to address the issue once again. In Shapiro *et al.* v. Paradise Valley Unified School District No. 69, 374 F.3d 857 (9th Cir. 2004), the parents were represented in an Arizona dispute by an attorney licensed in Ohio but not in Arizona.[28] A dispute arose over the educational placement for the child. Although the adjudication history is somewhat convoluted, the dispute was eventually remanded to the hearing officer. On remand, the Administrative Law Judge (ALJ) questioned for the first time whether the parents' attorney could represent them because of his not being admitted to the Arizona bar. After briefing on the issue, the ALJ found that he could not do so. The attorney then sought an order from the local court permitting him to proceed *pro hac vice*. The court issued such an order and the ALJ conducted a hearing, finding the parents were entitled to reimbursement for a private placement. The federal district court affirmed the ALJ's determination, as did the 9th Circuit.

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[26]*Pro Hac Vice* means "for this occasion." It is a temporary license that permits an attorney with a license from another state to represent a client in a dispute but only for that dispute. In Indiana, a foreign attorney would have to petition the Indiana Supreme Court under Admission and Discipline Rule No. 3

[27]See I.C. 33-43-2-1, which states the unauthorized practice of law is a Class B misdemeanor.

[28]This is the same Paradise Valley Unified School District No. 69 involved in the recent case over the "Tiles for Smiles" program. See "Bricks and Tiles: Fund-Raising and the First Amendment," *supra*.

The parents then sought recovery of their attorney fees under 20 U.S.C. § 1415(i)(3) for both hearings (the original one and the hearing on remand) and related proceedings in court. The parents argued that the initial ALJ permitted the Ohio attorney to represent them and the school district did not object, and that this entitled them to recover attorney fees prior to the Ohio attorney's obtaining permission *pro hac vice* to proceed. The federal district court disagreed, finding that an ALJ could not waive the Arizona requirements for admission to practice law in Arizona *pro hac vice*. As a consequence, the out-of-state attorney's work prior to his admission *pro hac vice* was not compensable. The district court relied upon Z.A. for guidance.

The 9th Circuit affirmed, noting that "no person is allowed to practice law in Arizona unless that person is an active member of the State Bar [citation omitted], or is authorized to appear *pro hac vice*." 374 F.3d at 862. In Arizona, only a court can grant admission *pro hac vice*. An ALJ cannot waive this requirement, and opposing counsel cannot "consent" to it. Id. "The Arizona Supreme Court's rules regulating the practice of law, including admission *pro hac vice*, are mandatory and must be followed. The district court's order awarding attorney's fees only from the date of [the Ohio attorney's] admission to practice *pro hac vice* accordingly is affirmed." Id.

The Pledge of Allegiance[29]

> Words uttered under coercion are proof of loyalty to nothing but self-interest. Love of country must spring from willing hearts and free minds, inspired by a fair administration of wise laws enacted by the people's elected representatives within the bounds of express constitutional prohibitions. These laws must, to be consistent with the First Amendment, permit the widest toleration of conflicting viewpoints consistent with a society of free men.
>
> Justice Hugo L. Black, West Virginia State Board of Education v. Barnette, 319 U.S. 624, 644 (1943) (dissenting).

Compulsory unification of opinion achieves only the unanimity of the graveyard... If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

> Justice Robert H. Jackson, West Virginia State Board of Education v. Barnette, 319 U.S. 624, 640-42 (1943).

[29]Consult the Cumulative Index for other articles addressing aspects of the Pledge of Allegiance.

In times of national turmoil, everyone in government wishes to do something. It is at such times that legislators–especially State legislators–feel a sense of institutional impotency. All they can actually do is legislate, and that cannot be done quickly. Oftentimes, legislation passed quickly in response to some national crisis serves only to further divide. We need look no further than the response to the events of "9/11." The initial response from a shocked population was to rally around the flag. In every locale, flags were prominently displayed, especially on cars and other motor vehicles.

The legislation followed. During this period of intense patriotism, there were a series of moves to require the daily recitation of the Pledge of Allegiance, the display of the American flag in every classroom, and the establishment of a compulsory Moment of Silence. Special interest groups encouraged these endeavors by issuing reports showing which States already had such laws, which did not, and which left such weighty matters to the discretion of local public school officials, with a clear implication that "something has to be done" about the laggards.

It is during such times that many of us, as attorneys for State educational agencies, are called upon to review proposed legislation on behalf of our agencies. It is manifestly unpopular to question constitutionally suspect practices during such times, but it would be an abdication of our responsibilities if we did not. It is helpful to cite (and quote) Supreme Court decisions issued during similar periods of national crises, especially the Barnette case, decided during World War II and involving whether students could be expelled for declining to recite the Pledge of Allegiance based on religious proscriptions.[30]

Against this somber background comes The Circle School *et al.* v. Pappert *et al.*, 381 F.3d 172 (3rd Cir. 2004), which began with well intentioned but poorly crafted legislation in the Pennsylvania legislature. The relevant portions of the 2002 enactment are:

- The display of the American flag in every classroom in every public, private, or parochial school;
- Daily recitation of the Pledge of Allegiance or the National Anthem at the beginning of each school day;[31]

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[30]Supreme Court Associate Justice Jackson, who missed the 1945 term of the Supreme Court to serve as the Chief Prosecutor for the United States at the Nuremberg War Trials, never attended college and was the last member of the Supreme Court to pass the bar examination without graduating from a law school. He and Associate Justice Black, also quoted above, were sometimes bitter rivals. Their dispute over whether Black should have recused himself from a case involving one of Black's former law partners makes the recent dispute over Associate Justice Antonin Scalia seem tame by comparison.

[31]Both the federal district court in The Circle School, 270 F.Supp.2d 616 (E.D. Pa. 2003) and the Third Circuit interpret this clause as intending to include the "singing" of the National Anthem, although the law does refer only to recitation. Reciting the National Anthem, without having the words in front of you, is quite a linguistic trick, ten times harder than reciting the alphabet backwards. There are few people who can do so without considerable practice. Why? Because we never recite it. We always sing it.

- Students may decline to recite the Pledge (or sing the National Anthem, the courts presuppose), as well as decline to salute the flag, on the basis of "religious conviction or personal belief";
- However, school officials must notify in writing the parents or guardians of students who decline to recite the Pledge, sing the National Anthem, or salute the flag; and
- This law would not apply to a private or parochial school for which compliance would violate respective religious convictions of these entities.

Testimony recorded during discussion of the bill indicates that schools could levy sanctions against students who declined to participate. 381 F.3d at 174-75.

The enactment was challenged in court, *inter alia*, as violating the First Amendment's Free Speech Clause, the Fourteenth Amendment right of parents to direct the educational upbringing of their children, the freedom to expressive association by certain private schools, and the First Amendment's Establishment Clause by extending an "opt out" privilege only to certain religious schools. The federal district court found the law to be unconstitutional on its face. Notably, the court found the parental-notification clause amounted to a "viewpoint-based regulation that operates to chill students' speech." The law could not pass the strict scrutiny required for such viewpoint discrimination because the law is "not the most narrowly tailored method to achieve the government's interest[32] in notifying the parents of the administration of the Act, an interest that is, in any case, not sufficiently compelling to infringe on students' free speech rights." Id. at 175-76, quoting the district court's decision at 270 F.Supp.2d at 623-26. The district court entered a permanent injunction prohibiting enforcement of the Act.

On appeal, the defendants raised three issues: (1) Whether the parental-notification provision violates students' free speech rights; (2) whether the Act violates parents' Fourteenth Amendment fundamental liberty interest in choosing the educational method used to educate their children; and (3) whether the Act violates the private schools' exercise of their rights in free expressive association. Id. at 177.

Parental Notification and Viewpoint Discrimination

The 3rd Circuit cited the Big Three cases involving student free speech (Tinker, Fraser, and Hazelwood), observing that although students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," Tinker v. Des Moines Ind. Comm. Sch. Dist., 393 U.S. 503, 506, 89 S. Ct. 733 (1969), such a right is not "automatically coextensive with the rights of adults in other settings." Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682, 106 S. Ct. 3159 (1986). There must be a "careful balance between the First Amendment rights of students and the special needs of the state in ensuring proper educational standards and curriculum[.]" 381 F.3d at 177-78.

[32]The government's stated compelling interest was to teach patriotism and civics.

West Virginia State Board of Education v. Barnette "concluded that government officials are forbidden under the Constitution to compel or coerce students to salute the national flag or recite the Pledge of Allegiance," but the Supreme Court "subsequently found state and local regulations offering the Pledge of Allegiance, but permitting students to abstain from recitation" to be "[c]onsistent with our case law." Id. at 178, citing and quoting Elk Grove Unified Sch. Dist. v. Newdow, 124 S.Ct. 2301, 2306 (2004).

"Pennsylvania's parental notification clause clearly discriminates among students based on the viewpoints they express," the 3rd Circuit found at 180. The notification is only triggered when a student exercises a First Amendment right not to speak; it does not apply to students who elect to recite the Pledge or sing the National Anthem. "[A] parental notification clause that is limited only to parents of students who refuse to engage in such recitation may have been purposefully drafted to chill speech by providing a disincentive to opting out of [the] Act." Id. at 180-81 (citation and internal punctuation omitted). The defendants failed to "offer any convincing governmental interest which this parental notification scheme is designed to further." Id. at 181.

Right to Expressive Association

The private schools complained the Act interferes with the schools' ability to express their values and, instead, forces them to espouse the government's view on patriotism. The 3rd Circuit found the private schools did have certain values and philosophies germane to their educational functions such that they were engaged in "expressive association" so as to come within the ambit of the First Amendment. The Act requires all such schools to recite the Pledge or sing the National Anthem on a daily basis, which "substantially burdens the schools' mission of 'freedom of choices.'" Id. at 182.

The defendants attempted to minimize any constitutional intrusion by noting the Pledge is only 31 words long and the Anthem constitutes only 80 words. Besides, the private schools could "make a general disclaimer" so as not to confuse the schools' values and philosophies with those inherent in the Act. This was an unwise position to take.

> Certainly, the temporal duration of a burden on First Amendment rights is not determinative of whether there is a constitutional violation, especially when the burden imposed by the state carries a clear and powerful message that is to be disseminated every school day. Similarly, the fact that schools can issue a general disclaimer along with the recitation does not erase the First Amendment infringement at issue here. For the schools are still compelled to speak the Commonwealth's message. Otherwise the state may infringe on anyone's First Amendment interest at will, so long as the mechanism of such infringement allows the speaker to issue a general disclaimer. Such an idea is contrary to the First Amendment's plain language.

Id. at 182-83. The court did not question that the government's interest in teaching patriotism and civics in all schools is a compelling interest, but the Act is not "narrowly tailored or the least restrictive means of achieving that interest." While another state law requires all schools to teach civics, as well as other subject matters, "each school may select the method to satisfy that requirement, which need not be by the rote recitation of prescribed words." Id. at 183.

Parental Interest in Directing Education of Child

The 3rd Circuit was less concerned with this issue. Because it had already found First Amendment violations, it didn't see a need to engage in overkill. Id.

The 3rd Circuit noted that patriotism can be expressed in innumerable ways, and that "compulsory unification of opinion" is not the means to the end, unless the end is the "unanimity of the graveyard." As a consequence, they concluded their opinion with the following:

> It may be useful to note our belief that most citizens of the United States willingly recite the Pledge of Allegiance and proudly sing the national anthem. But the rights embodied in the Constitution, most particularly in the First Amendment, protect the minority–those persons who march to their own drummers. It is they who need the protection afforded by the Constitution and it is the responsibility of federal judges to ensure that protection.

Id.

Maneuvering in Congress

While the 3rd Circuit opined that it is the role of federal judges to ensure the protection of "those persons who march to their own drummers," *supra*, Congress would rather the federal judges not listen to the beat in the first place, especially where the Pledge of Allegiance is involved.

On September 23, 2004, the House of Representatives passed 247-173 a bill that would prohibit federal courts, including the U.S. Supreme Court, from entertaining disputes involving the Pledge or from striking the words "under God" from the Pledge. Supporters of the bill assert it is necessary to protect the role of religion as a part of the national heritage. Detractors assert it is election-year posturing that debases the Constitution.[33]

[33]"House Votes to Strip High Court of Authority in Pledge Cases," *Associated Press* dispatch (September 23, 2004).

Although the U.S. Supreme Court, in Elk Grove Unified School District *et al.* v. Newdow *et al.*, 124 S. Ct. 2301 (2004),[34] reversed the 9th Circuit Court of Appeals' decision finding the words "under God" violated the First Amendment, it did so based on a technicality–Newdow lacked standing to bring the action on behalf of his daughter. Supporters of the bill believe if the Supreme Court addressed the merits, "under God" would have been stricken from the Pledge. Rep. Todd Akin (R-Mo.) was quoted as saying Congress needs to prevent "activist judges" from "creating law" by holding "that it is wrong to somehow allow schoolchildren to say 'under God' in the Pledge."[35]

Should such a law be passed–and withstand an almost-certain "separation of powers" challenge–Pledge issues would be decided by State courts rather than federal courts. This would more likely result in more confusion given the potential for fifty different holdings based on the sometimes subtle (and sometimes not-so-subtle) differences in each State's constitution with regard to freedom of and freedom from religion.

Real Estate Sales and School Accountability Laws

As noted in **Quarterly Report** October-December: 2003, real estate agents are aware that the location of a house in a certain school district is becoming a driving factor in sales. If the house is located in a "good" school district, potential buyers have engaged in "bidding wars." Potential buyers, including those with children or who intend to have children, are researching standardized test scores and other school accountability data in order to identify the higher-performing schools. School performance is ranking with commute time, safety, and family-friendly environment as leading indicators. However, increased reliance on such a factor also means increased liability exposure.

Choctaw Properties, LLC, *et al.* v. Aledo Independent School District, 127 S.W.3d 235 (Tex. App. 2003) involved a family named the Cunninghams who bought a house based on representations the house was in the Aledo Independent School District. When the Cunninghams attempted to enroll their children in Aledo, they were informed their residence was in another school district. The Cunninghams sued Choctaw for misrepresenting the school-district status of the property. Choctaw filed a third-party claim against Aledo, Aledo's former superintendent, and one of Choctaw's former agents. When the subdivision was being built, Choctaw's agent obtained from Aledo's superintendent a statement the subdivision was within Aledo's attendance boundaries. Choctaw paid *ad valorem* taxes to the school district. The court found that no contract existed between Aledo and Choctaw based on the superintendent's letter. An indispensable element of a contractual relationship is a "meeting of the minds," which was absent in this case. Choctaw paid taxes because it was required to do so by law and not because of the superintendent's representations. The superintendent's representations were made based on his belief that local ordinance required him

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[34]See "The Pledge of Allegiance: 'One Nation, Under Advisement,'" **Quarterly Report** April-June: 2004.

[35] Ob. cit., *Associate Press* dispatch.

to do so. This does not constitute a "meeting of the minds." As a consequence, there was no contract. If there is no contract, there can be no breach of the contract. The court also rejected Choctaw's estoppel argument as a governmental entity is generally not subject to estoppel where it is performing its governmental functions. Lastly, the former superintendent was entitled to immunity because he acted under the reasonable belief that local ordinance required him to issue the letter indicating the subdivision was within the Aledo district, which would, in turn, provide bus service to the area.

Date: _____

_____
Kevin C. McDowell, General Counsel
Indiana Department of Education

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